BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID CHARLES BROWN	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,048,941
RUSKIN COMPANY	)	
Respondent	)	
AND	)	
	)	
INSURANCE COMPANY OF STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Respondent appeals the April 5, 2010, preliminary hearing Order of Administrative Law Judge Thomas Klein (ALJ). Claimant was awarded benefits in the form of medical treatment after the ALJ found that claimant had suffered an accidental injury which arose out of and in the course of his employment with respondent.

Claimant appeared by his attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Troy A. Unruh of Pittsburg, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held March 31, 2010, with attachments; and the documents filed of record in this matter.

ISSUES

In its Application For Review, respondent lists the issues as dealing with "the issue of medical treatment and insurance coverage for the Respondent".[1] However, in its

[1] Application For Review at 1.

brief to the Board, respondent disputes whether claimant suffered an accidental injury which arose out of and in the course of his employment. The first issues would not be jurisdictional under K.S.A. 44-534a. The issue regarding whether claimant suffered a compensable injury which arose out of and in the course of his employment with respondent is an issue which provides jurisdiction on appeal from a preliminary hearing order. That is the issue which will be determined by the Board in this decision.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant, a 30-year employee with respondent, had just finished working a 10-hour day, repairing small motors, on November 19, 2009. As he walked to the employee parking lot, claimant slipped while walking down some stairs. Claimant suffered an injury to his left upper extremity. Claimant believed that he slipped on loose gravel on the stairs. A co-worker named Jim Snow helped claimant up and escorted him to the human resources office where he met with Tim Rakestraw, respondent's corporate HSE coordinator and human resources manager. When claimant was asked what happened, he said he did not know, "he just lost his, or just tripped over his own feet when he came down the steps".[2] At the preliminary hearing, claimant testified that he slipped on loose gravel on the way to the parking lot. The loose gravel was not mentioned during his conversation with Mr. Rakestraw. A report was completed. However, it does not appear to have been a workers compensation accident report. Claimant testified that he filled out many pieces of paper at respondent's offices after the accident. Claimant took FMLA leave and turned the bills for the medical treatment in to his insurance carrier. Mr. Rakestraw testified that the paperwork was filled out after the workers compensation action was filed. He also denied that the steps leading to the parking lot had any gravel on them. Respondent does acknowledge that the steps are on company property.

The next day, claimant went to the emergency department at Labette Health where x-rays indicated a fracture of the radial head. Claimant was taken off work and referred for physical therapy. At the time of the preliminary hearing, claimant continued to experience pain in his left upper extremity including his shoulder. When asked if he told the witnesses that he tripped over his own two feet, claimant stated that he did not know, but he may have said so. He then told the witness that he was tired and just wanted to go home.

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[2] P.H. Trans. at 19-20.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[3]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[5]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[6]

K.S.A. 2009 Supp. 44-508(f) states:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which

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[3] K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] K.S.A. 2009 Supp. 44-501(a).

[6] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

> is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.[7]

Here, claimant was injured while on respondent's premises. The parking lot and the steps leading to that parking lot were respondent's property. Therefore, the "going and coming" rule in K.S.A. 2009 Supp. 44-508(f) would not apply to this situation.

K.S.A. 2009 Supp. 44-508(e) states:

> (e) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

Respondent argues that the act of walking down the steps was nothing more than a normal activity of daily living. It is also contended that claimant's description of the accident varied from the date of the fall to the time of the preliminary hearing. Claimant discussed falling over his own two feet on the date of the accident and later discussed the existence of gravel on the steps at the preliminary hearing. Respondent contends there was no gravel on the steps and this is just a made-up story for the benefit of securing workers compensation benefits.

In this case, there is no question that claimant's injury occurred "in the course of" claimant's employment. He was on the respondent's premises when he fell. A more difficult question is whether claimant's injury "arose out of" his employment when he fell on the steps leading to the parking lot.

In *Hensley*,[8] the Kansas Supreme Court categorized risks associated with work injuries into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the worker; and (3) neutral risks which have no particular employment or personal character. This analysis is similar to the analysis set forth in 1 *Larson's Worker's Compensation Law*, § 7.04[1][a] (2006). The simplest explanation is that if an employee falls while walking down the sidewalk or across a level factory floor for no discernable reason, the injury would not have happened if the employee had not been engaged upon an employment errand at the time.

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[7] K.S.A. 2009 Supp. 44-508(f).

[8] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979); see also *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d. 5, 61 P.3d 81 (2002).

"Only those risks falling in the first category are universally compensable; personal risks do not arise out of the employment and are not compensable."[9] However, in this instance, the fall is basically unexplained. Claimant discussed possibly falling over his own two feet, a common description used to explain being a klutz or being uncoordinated. The testimony of Mr. Rakestraw does nothing to clarify the cause of this accident. Claimant may have tripped, slipped or just fallen. It is not clear in this record. In Kansas, unexplained falls are compensable. As noted in Larson's above, the unexplained fall becomes compensable because if an employee falls, for no discernable reason, while walking down the sidewalk or across a level factory floor, or even while walking down steps, the injury would not have happened if the employee had not been engaged in employment at the time. Additionally, while walking down steps might, at times, be seen as an activity of daily living, the injury occurred as the result of the unexplained fall, not a normal activity of daily living.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has satisfied his burden of proving that he suffered an accidental injury which arose out of and in the course of his employment. Therefore, the award of benefits by the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Thomas Klein dated April 5, 2010, should be, and is hereby, affirmed.

IT IS SO ORDERED.

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[9] *Martin v. U.S.D. 233*, 5 Kan. App. 2d 298, 299, 615 P.2d 168 (1980).

[10] K.S.A. 44-534a.

Dated this ____ day of June, 2010.

HONORABLE GARY M. KORTE

c: William L. Phalen, Attorney for Claimant
Troy A. Unruh, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge